Supreme Court, U. S.
FILED
JAN 12 1977
MICHAEL RODAK, JR., CLERK

No. 76- 966

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

EDWIN D. WOLF, FLORA B. WOLF, MARC D. JONAS, SHERYL B. JONAS, FRANK J. WINNERMARK, CAROL A. WINNERMARK, CLIFFORD G. SAWYER, VIVIAN K. SAWYER, THOMAS D. SELLS, MARY B. SELLS, LUDWIG J. SPOLYAR, KIRSTEN SPOLYAR, IRVING H. PERLMUTTER, MARCIA L. PERLMUTTER, SAMUEL BLANK, HARRY STEIN and GLORIA DAROVIC,

Petitioners,

v.

TRANS WORLD AIRLINES, INC. and FLYING MERCURY, INC.

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REUBEN B. ROBERTSON III
ALAN B. MORRISON
Suite 700
2000 P Street, NW
Washington, D.C. 20036
(202) 785-3704

Attorneys for Petitioners

BURTON CAINE
PHILIP L. LUSTBADER
Wolf, Block, Schorr and Solis-Cohen
12th Floor, Packard Building
Philadelphia, Pennsylvania 19102

Of Counsel

THE CASILLAS PRESS, INC.–1717 K Street, N. W.–Washington, D. C.–223-1220

TABLE OF CONTENTS

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTION PRESENTED	2
STATUTE INVOLVED	2
STATEMENT	3
A. Facts	3
B. Proceedings in the District Court	5
C. The Decision of the Court of Appeals	6
REASONS FOR GRANTING THE WRIT	8
1. The Decision Below Is In Conflict With the Decisions of Virtually Every Other Court That Has Considered the Matter.	8
2. The Decision Below, Extending the Rationale of Cort v. Ash to the Federally-Regulated Airline Industry, Is Contrary to National Transportation Policies.	14
CONCLUSION	17
APPENDIX A, Court of Appeals Decision	1a
APPENDIX B, Order of the District Court	9a

CITATIONS

Cases:

Adams Express Co. v. Croninger, 226 U.S. 491 (1913)	16

Page

American Telephone & Telegraph Co. v. Florida-Texas Freight, Inc., 485 F.2d 1390 (5th Cir. 1973), *affirming* 357 F. Supp. 977 (S.D.Fla. 1973) 12

Archibald v. Pan American World Airways, 460 F.2d 14 (9th Cir. 1972) 13

Atchison, Topeka & Santa Fe Ry. v. Bouziden, 307 F.2d 230 (10th Cir. 1962) 13

Atchison T. & S.F. Ry. v. Kinkade, 203 Fed. 165 (D. Kan. 1912) 13

Bell v. Hood, 327 U.S. 678 (1948) 6, 7

Bernstein Bros. Pipe & Machinery Co. v. Denver & R.G.W.R. Co., 193 F.2d 441 (10th Cir. 1951) 13

Button v. Atchison, T. & S.F. Ry., 1 F.2d 709 (1924) 12

Chicago, Burlington & Quincy R. Co. v. Ready Mixed Concrete Co., 487 F.2d 1263 (8th Cir. 1973) 12

Chicago & North Western Ry. v. Hunt-Wesson Foods, 504 F.2d 905 (7th Cir. 1974) 13

Chicago M.S.P. & P.R. Co. v. Pittsburgh-Des Moines Steel Co., 411 F. Supp. 511 (S.D. Iowa 1976) 13

Cincinnati, New Orleans & Texas Pacific Ry. v. Chesapeake & Ohio Ry., 441 F.2d 483 (4th Cir. 1971) 13

Page

City Messenger Service v. Capitol Records Distributing Corp., 446 F.2d 6 (6th Cir. 1971), *cert. denied*, 404 U.S. 1059 (1972) 10, 11

City Messenger Service v. Capitol Records Distributing Corp., 327 F. Supp. 970 (S.D. Ohio 1970) 10

Compania Anonima Venezolana v. A.J. Perez Export Co., 303 F.2d 692 (5th Cir.), *cert. denied*, 371 U.S. 942 (1962) 12

Cort v. Ash, 422 U.S. 66 (1975) 2, 6, 14, 15, 16

Crancer v. Lowden, 315 U.S. 631 (1942) 11, 16

Fitzgerald v. Pan American World Airways, 229 F.2d 499 (2d Cir. 1956) 13

Garrett v. TIME-D.C., 502 F.2d 627 (9th Cir. 1974), *cert. denied*, 421 U.S. 913 (1975) 12

Hubbard v. Allied Van Lines, Inc., 540 F.2d 1224 (4th Cir. 1976) 13

In re Penn Central Transportation Co., 477 F.2d 841 (3rd Cir.), *affirmed*, 414 U.S. 885 (1973) 16

Locust Cartage Co. v. Transamerican Freight Lines, Inc., 430 F.2d 334 (1st Cir.), *cert. denied*, 400 U.S. 964 (1970) 12

Page

Louisville & Nashville R. Co. v. Central Iron & Coal Co., 265 U.S. 59 (1924) 11

Louisville & Nashville R. Co. v. Maxwell, 237 U.S. 94 (1915) 11

Louisville & Nashville R. Co. v. Rice, 247 U.S. 201 (1918) 11

Madler v. Artoe, 494 F.2d 323 (7th Cir. 1974) 13

Nader v. Allegheny Airlines, 512 F.2d 527 (D.C.Cir. 1975), *reversed*, 426 U.S. 290 (1976) 13

Penn Central Co. v. General Mills, Inc., 439 F.2d 1338 (8th Cir. 1971) 12

Pittsburgh, Cincinnati, Chicago & St. Louis Ry. v. Fink, 250 U.S. 577 (1919) 11

Southern Pacific Co. v. Miller Abbatoir Co., 454 F.2d 357 (3rd Cir. 1972) 13

State of Israel v. Metropolitan Dade County, 431 F.2d 925 (5th Cir. 1970) 12

T.I.M.E., Inc. v. United States, 359 U.S. 464 (1959) 11

Transcontinental Bus System, Inc. v. C.A.B., 383 F.2d 466 (5th Cir. 1967), *cert. denied*, 390 U.S. 920 (1968) 15

Page

Twentieth Century Delivery Service v. St. Paul Fire & Marine Ins. Co., 242 F.2d 292 (9th Cir. 1957) 16

United States v. Associated Air Transport, Inc., 275 F.2d 827 (5th Cir. 1960) 9

Orders of the Civil Aeronautics Board:

IATA Agreement Relating to Fare Matters, CAB Order No. E-24577 (Dec. 29, 1966) 3

IATA Agreements Relating to Fares via the North Atlantic, CAB Order No. E-24823 (March 6, 1967) 3

Trans World Airlines, et al., Enforcement Proceeding, CAB Order 73-6-9 (June 4, 1973) 6, 8

Statutes:

Communications Act, 47 U.S.C. § 203(c) 12

Federal Aviation Act of 1958, as amended, section 403, 49 U.S.C. § 1373 . . . . . *passim* section 404(b), 49 U.S.C. § 1374(b) 13

Interstate Commerce Act, section 6(7), 49 U.S.C. § 6(7) . . . . . 11, 13 49 U.S.C. § 16(3) . . . . . 11 49 U.S.C. § 304a . . . . . 11 49 U.S.C. § 908(f) . . . . . 11 49 U.S.C. § 1006a 11

Judicial Code, 28 U.S.C. § 1254(1) . . . . . 2 28 U.S.C. § 1337 5

Page

Motor Carrier Act, Part II of Interstate Commerce Act,
49 U.S.C. § 317(b) 11, 12, 13

Shipping Act,
46 U.S.C. § 817 12

Public Law 81-138, 63 Stat. 280 (1949) 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-

EDWIN D. WOLF, FLORA B. WOLF, MARC D. JONAS, SHERYL B. JONAS, FRANK J. WINNERMARK, CAROL A. WINNERMARK, CLIFFORD G. SAWYER, VIVIAN K. SAWYER, THOMAS D. SELLS, MARY B. SELLS, LUDWIG J. SPOLYAR, KIRSTEN SPOLYAR, IRVING H. PERLMUTTER, MARCIA L. PERLMUTTER, SAMUEL BLANK, HARRY STEIN and GLORIA DAROVIC,

Petitioners,

v.

TRANS WORLD AIRLINES, INC. and FLYING MERCURY, INC.,

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Plaintiffs Edwin D. Wolf, *et al.*, hereby petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit, affirming the dismissal of this action by the United States District Court for the Eastern District of Pennsylvania.

OPINIONS BELOW

The opinion of the court of appeals (Appendix A, *infra*) has not yet been officially reported. The order of the district court (Appendix B, *infra*) is unreported, and no separate opinion was issued by that court.

JURISDICTION

The judgment of the court of appeals was entered on October 14, 1976. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Did the court of appeals erroneously apply the rationale of *Cort v. Ash*, 422 U.S. 66, which denied a federal civil cause of action to a corporate stockholder based on a violation of a criminal statute, in rejecting an implied civil remedy for airline passengers subjected to overcharges under a federal regulatory statute that creates an absolute duty not to deviate from effective tariffs, thereby relegating persons injured by tariff violations to state contract actions?

STATUTE INVOLVED

In pertinent part, section 403(b) of the Federal Aviation Act of 1958, as amended, 49 U.S.C. § 1373(b), provides as follows:

> (1) No air carrier or foreign air carrier or any ticket agent shall charge or demand or collect or receive a greater or less or different compensation

> for air transportation, or for any service in connection therewith, than the rates, fares, and charges specified in then currently effective tariffs of such air carrier or foreign air carrier; and no air carrier or foreign air carrier or ticket agent shall, in any manner or by any device, directly or indirectly, or through any agent or broker, or otherwise, refund or remit any portion of the rates, fares, or charges so specified, or extend to any person any privileges or facilities, with respect to matters required by the Board to be specified in such tariffs except those specified therein. * * *

STATEMENT

A. Facts

In December, 1966 the Civil Aeronautics Board for the first time gave approval to an agreement adopted by the member carriers of the International Air Transport Association providing for the development and sale of Group Inclusive Tour ("GIT") packages in scheduled transatlantic airline service. *IATA Agreement Relating to Fare Matters,* CAB Order No. E-24577 (Dec. 29, 1966). The GIT is an arrangement whereby discounted round-trip air fares for groups of 15 or more persons travelling together on the same flights are tied to the purchase of sleeping accommodations and other services to be provided by an independent tour operator. The Board subsequently reaffirmed its interim approval of the GIT concept, specifically finding that the mandatory ground accommodations tie-in feature was neither unreasonable nor discriminatory. *IATA Agreements Relating to Fares via the North Atlantic,* CAB Order No. E-24823 (March 6, 1967). Since that time the GIT has been a standard feature of the North Atlantic fare structure.

One such GIT package arrangement was the "Mini-Plan" which respondent Trans World Airlines developed and operated in conjunction with respondent Flying Mercury for 14- and 21-day tours to London, Paris, Rome, Athens and other major European cities. These GIT's were promoted extensively and sold throughout the United States as offering attractive vacation trips to Europe at minimal cost. In accordance with the applicable IATA resolutions and CAB orders, TWA's implementing tariffs required, among other things, that each Mini-Plan tour participant be provided with hotel, motel or other housing accommodations in Europe for the entire trip.

Petitioners purchased and paid for TWA Mini-Plan GIT tours to Europe during 1971 and 1972. However, when they arrived at their European destinations, they were unable to obtain the hotel and guest house lodgings for which the GIT tariff rule provided, and for which they had paid. This was because the only accommodations offered to tour participants were located hundreds of miles away from the advertised destination cities, and because restrictions and conditions were imposed on the use of those accommodations that were literally impossible to meet. For example, purchasers of the tour to London were assigned a hotel located in Scotland, almost 350 miles away. Those on the Athens tour were relegated to lodgings 480 miles away, in Kavalla, while accommodations for the Zurich tour were in Austria. In each case participants had to check in by 6 p.m. on the first day in Europe or lose their accommodations for the entire tour.

As a result, petitioners were forced to obtain other accommodations for their trips at their own expense. In fact, it appears that sleeping accommodations were provided to no more than a handful of the approximately

17,000 TWA Mini-Tour participants in 1971 and 1972, although each purchaser was required to pay for those accommodations in full prior to departure from the United States.

B. Proceedings in the District Court

Petitioners commenced this class action for damages in July, 1972 in the United States District Court for the Eastern District of Pennsylvania. The complaint alleged, among other things, that in failing or refusing to provide the sleeping accommodations required under the GIT tariff, defendants TWA and Flying Mercury had in effect overcharged tour participants. That conduct by defendants was alleged to be contrary to their duty under section 403 of the Federal Aviation Act, 49 U.S.C. § 1373, to observe and comply with the applicable tariffs which had been filed with and approved by the Civil Aeronautics Board. Since plaintiffs were asserting an implied private right of action for damages under the Federal Aviation Act, they invoked the jurisdiction of the district court under 28 U.S.C. § 1337. Pendent jurisdiction was also asserted as to plaintiffs' state law claims for breach of contract and common law fraud, which were based on representations made by respondents in their advertising and promotional literature for the tours.

Subsequently, as a result of information about the Mini-Tour program brought to the attention of the Civil Aeronautics Board by petitioners and others, that agency obtained a consent order compelling TWA and Flying Mercury to cease and desist from selling or operating GIT's "under terms, conditions, and restrictions that do not conform to those in its promotional materials and which are such as to make required sleeping accommodations not reasonably available to the average participant," and further requiring the

respondents "to respond to claims of tour participants . . . by making the appropriate settlement" as to any feature of a GIT tour which was not provided as advertised. *Trans World Airlines, et al., Enforcement Proceeding,* CAB Order 73-6-9 (June 4, 1973). Thereafter, a supplemental complaint was filed by leave of the district court, in which the petitioners asserted an additional cause of action under the provisions of the CAB order.

On November 7, 1975, after extensive preliminary proceedings and discovery, the district court entered its order dismissing the action *sua sponte,* holding that "plaintiffs' claims do not present a substantial federal question and therefore must be and are hereby dismissed for lack of subject matter jurisdiction." (App. 9a.) Petitioners' pendent state law claims were also dismissed in the same order (*Id.*), and their motion for certification of the suit as a class action was denied as moot. (App. 10a.)

C. The Decision of the Court of Appeals

On appeal, the Court of Appeals for the Third Circuit, in an opinion by Circuit Judge Hunter, affirmed the dismissal of the action. That court did not, however, base its affirmance on lack of subject matter jurisdiction, a result plainly correct in light of plaintiffs' assertion of claims under the Federal Aviation Act and such cases as *Bell v. Hood,* 327 U.S. 678 (1948). Instead, it held that the complaint should be dismissed for failure to state a claim upon which relief can be granted. (App. 8a.) It concluded that the analysis called for in *Cort v. Ash,* 422 U.S. 66 (1975), a stockholder derivative suit seeking to imply a cause of action in the federal courts based on a violation of a federal criminal statute, precludes implication of a cause of action

for breach of the carrier's federal statutory duty not to deviate from its applicable tariffs. Thus, according to the opinion by Judge Hunter, petitioners' remedies, if any, must be found under state law. Since the ruling was not merely a declaration that petitioners had come to the wrong court, but was one which disposed of their section 403 tariff claim on the merits, *see Bell v. Hood, supra,* at 682, it meant that there would be no cause of action for these federal tariff violations as such, even in the state courts.

In reaching this result, the court of appeals found that section 403(b) of the Federal Aviation Act was *not* intended for the "especial benefit" of those who are charged more than the amounts provided for in the tariffs. (App. 5a.) This must be the case, the court reasoned, because the law prohibits not only charging more than the tariff amount, but also charging less. According to the Third Circuit's opinion, "the only plausible reason" for the statutory proscription of tariff deviations was "to empower the CAB to control the supposedly pernicious competitive activities that were the target of the Federal Aviation Act." (App. 6a.) By this logic, the fact that strict observance of tariffs might protect the travelling public from discrimination and unreasonable charges is reduced to a merely incidental side-effect of the regulatory statute.

In the second part of its discussion, the court determined that permitting private suits for tariff violations under section 403 would not be consistent with the purposes of the Federal Aviation Act, which it described as the promotion of efficient air service at reasonable charges, without unjust discriminations, undue preferences, or unfair or destructive competition. (App. 7a.) Concern was first expressed that adjudication of tariff questions by the courts would intrude into the domain of the Civil Aeronautics Board, although

that agency had already held respondents' very conduct which was at issue in this case to be unfair and deceptive practices contrary to the Federal Aviation Act.[1] Moreover, the court said, since the CAB had previously issued its cease and desist order, allowing recovery of damages on the part of those injured "is unnecessary to further the purposes of the Act, which deals with the health of the airline industry, not with remedies for breach of contract." (*Id.*) In this regard, the opinion simply ignored the fact that the order entered by the CAB expressly required the respondents to make appropriate refunds to tour purchasers to whom sleeping accommodations or other tour features were not made reasonably available.

Finally, the court noted that a state contract or misrepresentation remedy might be available to the plaintiffs. (App. 8a.) Since it could discern no "countervailing national interest" whatever in the availability of a remedy for tariff violations as such, the appellate court reasoned that the cause of action must be considered "one traditionally relegated to state law, so that implication of a federal cause of action would be inappropriate." (App. 7a.)

REASONS FOR GRANTING THE WRIT

1. The Decision Below Is In Conflict With the Decisions of Virtually Every Other Court That Has Considered the Matter.

The Third Circuit's decision that no private cause of action can be implied from the duty to observe applicable tariffs under the Federal Aviation Act is in direct conflict

[1] *Trans World Airlines, et al., Enforcement Proceeding, supra.*

with the decisions of other federal appellate courts interpreting the same statutory provision, and with decisions of this Court and other circuits dealing with identical provisions in other regulatory statutes.

For example, *United States v. Associated Air Transport, Inc.*, 275 F.2d 827 (5th Cir. 1960), was a case in which an air carrier sought recovery from the government, as charterer, of the exact charges for air transportation services specified in its tariff, which had not been paid in full. Rejecting the government's defenses based on contract and estoppel theories, the Fifth Circuit concluded that the statutory obligation to abide by the applicable tariff under section 403, and *not* the parties' contractual relations, establishes the carrier's right to recovery:

> Filed as it was under compulsion of § 403(a) of the Civil Aeronautics Act of 1938, the tariff carried the statutory mandate of § 403(b) that it and it alone was to be the sole standard for services to be rendered and charges assessed and collected. In the implementation of this stringent legislative policy, the courts have been equally emphatic that the basis for the charge or credit must be found in the tariff. If it is not in the tariff, it is not allowable. It is not a mere matter of contract. . . . The tariffs are both conclusive and exclusive; they may not be added to through reference to outside contracts or agreements or understandings or promises.

275 F.2d at 832-33 (footnotes omitted). This decision is in direct conflict with the Third Circuit's holding that the only basis for recovery arises from the contract between the parties, as interpreted under state law, not from the federal statutory duty to adhere to an effective tariff.

The Sixth Circuit has also ruled specifically on the basis on which an action could be brought to recover the difference between the amount collected by a carrier for air transportation services and the amount specified in the applicable tariffs. *City Messenger Service v. Capitol Records Distributing Corp.*, 446 F.2d 6 (6th Cir. 1971), *cert. denied*, 404 U.S. 1059 (1972). In that case several thousand air freight shipments had been made and paid for in accordance with airbills specifying rates lower than those in the published tariffs. Since all shipments had been made at least six years before the carrier brought suit to recover the deficit, the issue presented was whether the action was one for breach of contract, in which case a fifteen-year statute of limitations would apply, or one arising from a statutory liability, which would be subject to a six-year limit. The district court dismissed the action as time-barred:

> This actually is not an action on a contract. The price stated in the contract is not what the plaintiff seeks to recover – it is the difference between a tariff price and the price contracted for. But for the [Federal Aviation Act], the contract would have been a perfectly valid one. . . . Essentially the foundation of the plaintiff's claim is or are the undercharge sections of the federal statutes which have been referred to hereinabove. Essentially this is an action on a "statute" and for that reason the Ohio six-year statute would apply.

City Messenger Service v. Capitol Records Distributing Corp., 327 F. Supp. 970, 973 (S.D. Ohio 1970). The Sixth Circuit affirmed, agreeing with the district court that the action was one for statutory undercharges based solely on the legal obligations imposed on the carrier by section

403(b) of the Federal Aviation Act, 446 F.2d at 7, precisely the opposite of the decision rendered in this case by the Third Circuit.

The decision below is also irreconcilable with the decisions of this Court implying a private civil remedy for violations of substantially identical language in section 6(7) of the Interstate Commerce Act, 49 U.S.C. § 6(7), which was the direct model for section 403(b) of the Federal Aviation Act. Almost sixty years ago, this Court ruled in *Louisville & Nashville R. Co. v. Rice*, 247 U.S. 201 (1918), that a railroad's tariff recovery claim is based on and arises from the duty created by section 6(7). This Court has also consistently held that the rights and duties of carriers subject to that Act are defined solely by the applicable tariffs and regulations, not by contract obligations or defenses which may arise under state law. *Crancer v. Lowden*, 315 U.S. 631 (1942); *Louisville & N. R. Co. v. Central Iron & Coal Co.*, 265 U.S. 59 (1924); *Pittsburgh, Cincinnati, Chicago & St. Louis Ry. v. Fink*, 250 U.S. 577 (1919); *Louisville & N. R. Co. v. Maxwell*, 237 U.S. 94 (1915). Similarly, the Court has recognized that shippers have always had an implied right of action to recover tariff overcharges under the same language in the Motor Carrier Act, 49 U.S.C. § 317(b): "The occasion for reparation from motor carriers would chiefly arise . . . in the event of overcharges above published tariff rates. Shippers can recover *such overcharges* in court as the law now stands." *T.I.M.E., Inc. v. United States*, 359 U.S. 464, 478 n. 18 (1959) (Quoting testimony of ICC Commissioner Eastman in 1939 Senate hearings). Congress obviously agreed with the view that there was a cause of action for tariff undercharges and overcharges as such, since it subsequently established a uniform statute of limitations applicable to such actions under each title of the Interstate Commerce Act, 49 U.S.C. §§ 16(3), 304a, 908(f), 1006a, Pub. Law 81-138, 63 Stat. 280 (1949).

Other federal circuit courts have also recognized implied civil remedies for departures from tariffs under the Interstate Commerce Act and the equivalent provisions in similar regulatory statutes:

–The Eighth Circuit more than fifty years ago held, in *Button v. Atchison, T. & S.F. Ry.*, 1 F.2d 709 (1924), that there is an implied right of action arising from the statutory duty not to deviate from railroad tariffs, which is distinct and independent from any contract claim that might exist, and it has more recently recognized that right in *Penn Central Co. v. General Mills, Inc.*, 439 F.2d 1338 (8th Cir. 1971), and *Chicago, Burlington & Quincy R. Co. v. Ready Mixed Concrete Co.*, 487 F.2d 1263 (8th Cir. 1973).

–The Fifth Circuit has expressly recognized the implied federal cause of action for tariff deviations under the Shipping Act, 46 U.S.C. § 817, *State of Israel v. Metropolitan Dade County*, 431 F.2d 925 (5th Cir. 1970); *Compania Anonima Venezolana v. A.J. Perez Export Co.*, 303 F.2d 692 (5th Cir.), *cert. denied*, 371 U.S. 942 (1962), and the Communications Act, 47 U.S.C. § 203(c), *American Telephone & Telegraph Co. v. Florida-Texas Freight, Inc.*, 485 F.2d 1390 (5th Cir. 1973), *affirming* 357 F. Supp. 977 (S.D. Fla. 1973).

–In *Garrett v. TIME-D.C.*, 502 F.2d 627 (9th Cir. 1974), *cert. denied*, 421 U.S. 913 (1975), a shipper was found to have an implied right of action under the Motor Carrier Act, 49 U.S.C. § 317(b).

–Other cases to the same effect include *Locust Cartage Co. v. Transamerican Freight Lines, Inc.*, 430 F.2d 334 (1st Cir.), *cert. denied*, 400 U.S. 964 (1970) (Motor

Carrier Act, 49 U.S.C. § 317(b)), *Southern Pacific Co. v. Miller Abbatoir Co.*, 454 F.2d 357 (3rd Cir. 1972) (Interstate Commerce Act § 6(7)); *Cincinnati, New Orleans & Texas Pacific Ry. v. Chesapeake & Ohio Ry.*, 441 F.2d 483 (4th Cir. 1971) (Interstate Commerce Act § 6(7)); *Chicago & North Western Ry. v. Hunt-Wesson Foods*, 504 F.2d 905 (7th Cir. 1974) (Interstate Commerce Act § 6(7)); *Madler v. Artoe*, 494 F.2d 323 (7th Cir. 1974) (Motor Carrier Act); *Bernstein Bros. Pipe & Machinery Co. v. Denver & R.G.W.R. Co.*, 193 F.2d 441 (10th Cir. 1951) (Interstate Commerce Act § 6(7)); *Atchison, Topeka & Santa Fe Ry. v. Bouziden*, 307 F.2d 230 (10th Cir. 1962) (Interstate Commerce Act § 6(7)); *see also, Chicago M.S.P. & P.R. Co. v. Pittsburgh-Des Moines Steel Co.*, 411 F. Supp. 511 (S.D. Iowa 1976) (Interstate Commerce Act § 6(7)); *Atchison T. & S.F. Ry. v. Kinkade*, 203 Fed. 165 (D. Kan. 1912) (Interstate Commerce Act § 6(7)).

The decision below also calls into question the continuing availability of private civil remedies that have been implied from other parts of the Federal Aviation Act such as section 404(b), 49 U.S.C. § 1374(b). *See e.g., Nader v. Allegheny Airlines*, 512 F.2d 527, 537-38 (D.C. Cir. 1975), *reversed on other grounds*, 426 U.S. 290 (1976); *Archibald v. Pan American World Airways*, 460 F.2d 14 (9th Cir. 1972); *Fitzgerald v. Pan American World Airways*, 229 F.2d 499 (2d Cir. 1956); *see also, Hubbard v. Allied Van Lines, Inc.*, 540 F.2d 1224 (4th Cir. 1976) (action under nondiscrimination provision of Interstate Commerce Act). For that reason the decision will almost certainly generate additional litigation in the various circuits, and very likely in this Court, to determine whether the same rationale should also extinguish the implied statutory remedy for discrimination.

In short, the Third Circuit's holding that no implied cause of action is available to petitioners to obtain a refund of tariff overcharges stands alone against an overwhelming array of cases which have found a private civil remedy arising from the same or virtually identical statutory language, and certiorari should be granted to resolve this conflict.

2. The Decision Below, Extending the Rationale of Cort v. Ash to the Federally-Regulated Airline Industry, Is Contrary to National Transportation Policies.

An additional reason for granting certiorari in this case is the Third Circuit's apparent misapprehension and misapplication of the tests for implication of private civil remedies from federal criminal and regulatory statutes enunciated in *Cort v. Ash*, 422 U.S. 66, 78 (1975). First, the circuit court severely narrowed the "especial benefit" test into one requiring that every member of the class must be equally entitled to sue for every violation of the statute. (App. 5a-6a.) This Court had put the issue in a much simpler and, we believe, more sensible way in *Cort:* "does the statute create a federal right in favor of the plaintiff?" 422 U.S. at 78. Under this standard there can be little question that plaintiffs, as users of air transportation services, do have a federally-protected right under section 403(b) not to be subjected to charges in excess of effective tariffs, just as the carriers equally have a federal right to collect the full amounts specified in the tariffs for their services. The statute involved in the *Cort* case, by contrast, made no reference whatever to the interests of corporate stockholders which the plaintiffs there were seeking to vindicate.

Similarly, in considering whether implication of a private remedy would be "*consistent* with the underlying purposes of the legislative scheme", *id.* at 78 (emphasis added), the court of appeals applied a quite different standard – whether or not the remedy is *necessary* to further the legislative purposes. In addition, the court misconstrued the essential purposes of the Aviation Act by focusing on only one of its objectives – the financial well-being of the airlines – and ignoring other equally important values. Surely, protection of shippers and the travelling public from discriminatory and unreasonable charges is an important underlying purpose of the Act, *Transcontinental Bus System, Inc. v. C.A.B.*, 383 F.2d 466, 475 (5th Cir. 1967), *cert. denied*, 390 U.S. 920 (1968), and it is hard to see how a private civil remedy to enforce tariff requirements could conceivably interfere or be inconsistent with that purpose.[2]

To the contrary, such a remedy is essential to the integrity of the entire system of airline rate regulation. If a carrier were allowed to retain the proceeds of tariff overcharges because shippers and passengers could not obtain refunds in court, a strong incentive would exist to do what the law prohibits. The retention of any such excess revenues would also give the carrier an unfair advantage over its competitors in the marketplace, no doubt stimulating them to overcharge their customers also. By the same token, since the carriers themselves will henceforth be unable – at least in the Third Circuit – to rely on an implied cause of action under section 403 to recover tariff undercharges, illegal price cutting and rebating will be encouraged. To avoid just such

---

[2] To the extent that an issue of tariff construction might be involved, of course, referral to the CAB under the primary jurisdiction doctrine may be made to avoid conflicts and obtain the benefits of agency expertise.

results, this Court has emphasized the need to facilitate civil actions for the enforcement of tariffs, *Crancer v. Lowden*, 315 U.S. 631, 636 (1942), and indeed the ICC not merely permits but affirmatively requires carriers under its jurisdiction to sue for unpaid freight charges, *see In re Penn Central Transportation Co.*, 477 F.2d 841, 844 (3d Cir.), *affirmed*, 414 U.S. 885 (1973). Thus, in reality, implication of private civil remedies from section 403 is not only consistent with the purposes of the Federal Aviation Act but will serve to advance those purposes.

Finally, the decision misapplies the fourth *Cort* test, namely "is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?" 422 U.S. at 78. The mere fact that some relief might be available in some cases brought in the state courts cannot alone answer the question, just as it would be incorrect to assume, as the court below did, that state contract remedies will be adequate in all cases. For example, some states might well recognize estoppel and other contractual defenses that would plainly be at odds with federal transportation policies. Moreover, the court of appeals simply ignored the fact that the governance of interstate and international air transportation is not "basically the concern of the States" but, like other modes of transportation, is an area in which national policy is of particular importance. *Adams Express Co. v. Croninger*, 226 U.S. 491 (1913); *Twentieth Century Delivery Service v. St. Paul Fire & Marine Ins. Co.*, 242 F.2d 292 (9th Cir. 1957). Tariff violations have *not* traditionally been relegated to state contract law, as the host of cases recognizing implied federal statutory remedies in this area (*supra*, pp. 9-13) strongly attest, and it would be seriously disruptive and ill-advised for the federal courts to impose such a role on the state courts.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be issued to review the Third Circuit's decision.

Respectfully submitted,

REUBEN B. ROBERTSON III
ALAN B. MORRISON

Suite 700
2000 P Street, NW
Washington, D.C. 20036
(202) 785-3704

Attorneys for Petitioners

BURTON CAINE
PHILIP L. LUSTBADER
Wolf, Block, Schorr and Solis-Cohen
12th Floor, Packard Building
Philadelphia, Pennsylvania 19102

Of Counsel

January 12, 1977

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 76-1055

EDWIN D. WOLF, FLORA B. WOLF, MARC D. JONAS, SHERYL B. JONAS, FRANK J. WINNERMARK, CAROL A. WINNERMARK, CLIFFORD G. SAWYER, VIVIAN K. SAWYER, THOMAS D. SELLS, MARY B. SELLS, LUDWIG J. SPOLYAR, KIRSTEN SPOLYAR, IRVING H. PERLMUTTER, MARCIA L. PERLMUTTER, SAMUEL BLANK, HARRY STEIN and GLORIA DAROVIC,
Appellants,

v.

TRANS WORLD AIRLINES, INC. and
FLYING MERCURY, INC.,
Appellees.

Appeal From the United States District Court
For the Eastern District of Pennsylvania
(D.C. Civil No. 72-1329)

Argued September 9, 1976
Before VAN DUSEN, HUNTER and WEIS, *Circuit Judges*

Wolf, Block, Schorr and Solis-Cohen
Burton Caine
Philip L. Lustbader
Attorneys for Appellants

Robert M. Landis
Gregory D. Keeney
Dechert, Price & Rhoads
Attorneys for Appellees

(Filed Oct. 14, 1976)

HUNTER, *Circuit Judge*:

This is an appeal from the district court's order dismissing plaintiffs' action on the basis of our opinion in *Polansky v. Trans World Airlines, Inc.*, 523 F.2d 332 (3d Cir. 1975). The instant case raises an issue not presented in *Polansky*, but we affirm nevertheless.

I.

Plaintiffs-appellants were participants in Trans World Airlines (TWA) "Mini-Plans" in 1971 and 1972. Each "Mini-Plan" involved a flight to a European city, hotel accommodations, a rental car, and other ancillary services, all for one discount fare. Under the applicable tariff, the Civil Aeronautics Board conditioned its approval of the discount air fare on TWA's pledge to provide each tour participant with sleeping accommodations for the entire trip. The advertisement for each Mini-Plan specified the city that was to be the focus of the tour, the types of cars and sightseeing packages offered, and the availability of lodging. For example, the London Mini-Plan cost $337 per person; it included round-trip air fare (New York to London), one night's lodging at a hotel and twelve nights at a guest house in Dumfries, a car with unlimited mileage, and a "Getaway Hotel Pass and Discount Card." More detailed brochures and subsequent communication from TWA revealed to participants that the guest house vouchers would be invalid for their entire stay if not presented at their particular hostelry before 6:00 p.m. on the date of their arrival in Europe.

Only after arrival in Europe did the participants discover that their guest houses were not located in suburbs of the arrival cities, but were instead so far away that it was impracticable to arrive at the guest houses before 6:00 p.m.

on the dates their flights touched down. Dumfries, for example, turned out to be a Scottish town some 350 miles from London.[1] As a result, all plaintiffs were forced to forfeit the free guest house accommodations and fend for themselves.

Upon complaints from various participants, the CAB issued a cease and desist order, directing TWA, among other things, to describe properly the restrictions imposed upon availability of the offered lodging and to state expressly the distance from arrival city to guest house, if greater than 60 miles. Before the issuance of that order, plaintiffs instituted against TWA a class action for private damages in the Eastern District of Pennsylvania. Plaintiffs contended that the Mini-Plan advertisements were deceptive, inasmuch as they caused plaintiffs to believe that the towns in which their guest houses were located were near the tour cities. They asserted rights of recovery under sections 403(b) and 411 of the Federal Aviation Act, 49 U.S.C. §§ 1373(b), 1381. After discovery had begun, the district court *sua sponte* raised the question of subject matter jurisdiction. On November 7, 1975, the court dismissed plaintiffs' federal claims on the basis of *Polansky, supra*. The court also dismissed their pendent state claims. Plaintiffs appeal from that order.

---

[1] The distances between tour city and guest house site varied from a low of 185 miles (Zurich, Switzerland to Nauders, Austria) to a high of 480 miles (Athens to Karola, Greece).

There is some indication that TWA devised the Mini-Plans knowing that the participants would never be able to avail themselves of the free lodging offer, as a means of securing CAB approval of the discount air fare without having to provide the sleeping accommodations required by the tariff.

II.

In *Polansky*, we held that § 411[2] of the Federal Aviation Act gives rise to no implied private right of action. We need not repeat all that we said there. It is sufficient to note that *Polansky* forecloses plaintiffs' attempt to discover an implied remedy within § 411 in this case.

Plaintiffs also raise a claim under § 403(b) of the Act. *Polansky* did not deal with that section, but the result here is the same: there is no implied private right of action.

Section 403(b), 49 U.S.C. § 1373(b), provides in pertinent part as follows:

> No air carrier or foreign air carrier or any ticket agent shall charge or demand or collect or receive a greater or less or different compensation for air transportation, or for any service in connection therewith, than the rates, fares, and charges specified in then currently effective tariffs of such

---

[2] § 411, 49 U.S.C. § 1381, reads as follows:

> The Board may, upon its own initiative or upon complaint by any air carrier, foreign air carrier, or ticket agent, if it considers that such action by it would be in the interest of the public, investigate and determine whether any air carrier, foreign air carrier, or ticket agent has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof. If the Board shall find, after notice and hearing, that such air carrrier, foreign air carrier, or ticket agent is engaged in such unfair or deceptive practices or unfair methods of competition, it shall order such air carrier, foreign air carrier, or ticket agent to cease and desist from such practices or methods of competition. Pub. L. 85-726, Title IV, § 411, Aug. 23, 1958, 72 Stat. 769.

> air carrier or foreign air carrier; and no air carrier or foreign air or ticket agent shall, in any manner or by any device, directly or indirectly, or through any agent or broker, or otherwise, refund or remit any portion of the rates, fares, or charges so specified, or extend to any person any privileges or facilities, with respect to matters required by the Board to be specified in such tariffs, except those specified therein.

Plaintiffs allege, and TWA does not deny, that TWA received a higher price for the services provided than that specified in the tariff, because the tour participants were in fact unable to use the sleeping accommodations. Plaintiffs rightly contend that terms required by the tariff become part of the contract between passengers and carrier, even though not expressly mentioned. *Lichten v. Eastern Airlines, Inc.*, 87 F.Supp. 691 (S.D. N.Y. 1949), *aff'd* 189 F.2d 939 (2d Cir. 1951); *accord, Tishman & Lipp, Inc. v. Delta Air Lines,* 413 F.2d 1401, 1403 (2d Cir. 1969). This does not mean, however, that a breach of that contract, which happens to involve deviation from the tariff, gives rise to a private remedy under § 403(b).

We reach this conclusion by following the analysis set forth in *Cort v. Ash*, 422 U.S. 66, 78 (1975). In deciding whether a private remedy is implicit in § 403(b), we must first determine whether plaintiffs are members of that class for whose especial benefit the statute was enacted. *Id.* Plaintiffs here are not the special beneficiaries of § 403(b). That section prohibits the charging of fares either higher or lower than those established by the tariff. Yet a passenger could claim to be injured only by a higher charge. Because § 403 (b) proscribes violations of the tariff that inure to passengers' benefit as well as to their detriment, we conclude that § 403

(b) could not have been passed especially for the benefit of those in plaintiffs' position. Thus, TWA's violation of the tariff, which is the object of the section's ban, was merely incidental to the contractual claim presented by plaintiffs. That is, plaintiffs allege that they were promised lodgings that they could not, for all practical purposes, obtain. Because the tariff also required those lodgings to be provided, TWA's breach of promise amounted to deviation from the tariff as well. But if a carrier specifically contracted with a group of passengers to furnish carriage and other services at a cost *below* the tariff rate, and then did so, the carrier would not break its contract; however, it would violate the tariff. Yet surely the passenger, suffering no injury, would have no right of action under § 403(b).

Moreover, aggrieved passengers do not need protection from § 403(b). It is enough that the tariff provisions implicitly form part of the contract of carriage. When this contract is broken, an action in contract will lie; no special protection, couched in terms of tariff violations, is needed. Thus, it is evident that § 403(b) does not specially protect a class of which plaintiffs are members. Instead, it was designed to empower the CAB to control the supposedly pernicious competitive activities that were the target of the Federal Aviation Act. *See Polansky, supra,* 523 F.2d at 336-37. That is the only plausible reason for its proscription of fares below, as well as above, the tariff levels.

Even if plaintiffs could pass this first step in the *Cort* analysis, they would still not meet the third *Cort* requirement for the implication of a private remedy,[3] that the private remedy

[3] The second step in the *Cort* analysis involves an investigation of legislative intent with respect to the availability *vel non* of private remedies. As we noted in *Polansky*, the Federal Aviation Act and its legislative history offer little illumination in this area. 523 F.2d at 336.

be consistent with the purposes of the legislative scheme. *Cort*, *supra*, 422 U.S. at 78. The policy of the Act, as we stated in *Polansky*, is the promotion of efficient air service at reasonable charges, without unjust discriminations, undue preferences, or unfair or destructive competition. 523 F.2d at 336-37. To that end, the Act created the CAB, which is to control all facets of the airline industry. *Id.* at 339. Permitting private suits under 403(b) in situations where the CAB has found no tariff violation would undermine agency discretion, *id.*; permitting private suits in cases – like this one – where the agency has already issued a cease and desist order is unnecessary to further the purposes of the Act, which deals with the health of the airline industry, not with remedies for breach of contract.

The fourth step of the *Cort* analysis involves determining whether the cause of action is one traditionally relegated to state law, so that implication of a federal cause of action would be inappropriate. *Cort, supra,* 422 F.2d at 78. Under this guideline, we reach the conclusion arrived at in *Polansky*:

> Within the terms of the *fourth Cort* test, it would be entirely appropriate to relegate these appellants to whatever remedy has been created by state law. As the premise of this discussion, we recognize that a state remedy for breach of contract, breach of warranty and fraudulent misrepresentation was and, perhaps still is, readily available. Only where there is some countervailing national interest should the federal courts imply a federal private remedy when an adequate state remedy already exists. No countervailing national interest has been brought to the attention of the court in this case.

523 F.2d at 337. In the case *sub judice*, there has been no showing that a state contract or misrepresentation action would not lie.

For the foregoing reasons, the district court's dismissal of the action will be affirmed for failure to state a cause of action.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 76-1055

[Caption omitted in printing]

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed November 7, 1975, be, and the same is hereby affirmed. Costs taxed against the appellants.

ATTEST:
/s/
October 14, 1976 Clerk

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EDWIN D. WOLF, et al	:	CIVIL ACTION
Plaintiffs	:	NO. 72-1329
v.	:	
	:	
TRANS WORLD AIRLINES, INC.	:	
and	:	
FLYING MERCURY, INC.	:	
Defendants	:	

ORDER

AND NOW, this 7th day of November 1975, after consideration of the entire record and briefs of the parties:

1. Plaintiffs' motion to file supplemental pleadings is hereby granted.
2. (a) Plaintiffs having abandoned their claims to relief under Section 5 of the Federal Trade Commission Act, 15 U.S.C. Section 45, the complaint is dismissed in so far as it seeks relief under that statute;
   (b) Finding no significant distinctions between the instant case and *Polansky v. Trans World Airlines, Inc.*, Nos. 75-1088 and 75-1565 (3d Cir. filed Sept. 9, 1975), the court concludes that plaintiffs' claims do not present a substantial federal question and therefore must be and are hereby dismissed for lack of subject matter jurisdiction;
   (c) Plaintiffs' federal claims being unsubstantial their pendent state law claims must also be and are hereby dismissed.

3. Plaintiffs' motion for determination that this action may be maintained as a class action is dismissed as being moot.

BY THE COURT:

/s/ J. William Ditter, Jr., J.